
**ANALYZING A PRETRIAL DETAINEE’S § 1983
CLAIMS UNDER THE DELIBERATE
INDIFFERENCE STANDARD AMOUNTS TO
PUNISHMENT OF THE DETAINEE**

LESLIE B. ELKINS*

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INTRODUCTION

While the Eighth Amendment holds that a convicted inmate may be punished if that punishment is not “cruel and unusual,”¹ due process requires that a pretrial detainee not be punished at all.² Because pretrial inmates are “presumed to be innocent and held only to ensure their presence at trial, ‘any deprivation or restriction of . . . rights beyond those which are necessary for confinement alone, must be justified by a compelling necessity.’”³ Historically, imprisonment was not actually punishment but existed only for the safe custody of the accused until the administration of corporal or capital punishment.⁴ Blackstone explains, in the “dubious interval between the commitment and trial, a prisoner ought to be used with

* J.D. candidate, May 2009, Chicago-Kent College of Law, Illinois Institute of Technology; B.A., May 2006, University of Illinois, Urbana-Champaign.

¹ U.S. CONST. amend. VIII.

² *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977).

³ *Bell v. Wolfish*, 441 U.S. 520, 528 (1979) (*citing* United States *ex rel.* Wolfish v. Levi, 439 F. Supp. 114, 124 (S.D.N.Y. 1997)).

⁴ 4 WILLIAM BLACKSTONE, COMMENTARIES *300.

the utmost humanity; and . . . no[t] subjected to other hardships than such as are absolutely requisite for the purpose of confinement only . . .”⁵ Although today imprisonment is now one of the more common forms of punishment for crime,⁶ pretrial detention is still common practice.⁷ Accordingly, the rationale for pretrial detention still holds today; pretrial detention exists to ensure the detainee’s presence at trial and to maintain his safety as well as society’s safety in the meantime.⁸ If the goal of detaining pretrial inmates is to ensure their safety and presence at trial, a failure to protect them from other prisoners serves to destroy that rudimentary purpose.

By scrutinizing the way courts assess pretrial detainees’ claims against prison officials under 42 U.S.C. § 1983 (“§ 1983”), this article will demonstrate that pretrial detainees are essentially being punished in violation of the Constitution. For such claims, the circuit courts no longer differentiate between pretrial detainees and convicted prisoners.⁹ A long line of Seventh Circuit cases analyzing pretrial detainees’ § 1983 claims against prison officials illustrate that courts

⁵ *Id.*

⁶ Malcolm E. Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838, 838 (1972); Daniel E. Hall, *When Caning Meets the Eighth Amendment: Whipping Offenders in the United States*, 4 WIDENER J. PUB. L. 403, 455 (1995).

⁷ Candace McCoy, *Caleb Was Right: Pretrial Decisions Determine Mostly Everything*, 12 BERKELEY J. CRIM. L. 135, 139 (2007).

⁸ In the Bail Reform Act of 1966, Congress held that a person is committed to a detention facility only because no other less drastic means can reasonably ensure his presence at trial. Additionally, pretrial bail may not be used as a device to protect society from the possible commission of additional crimes by the accused. Bail Reform Act of 1966, 18 U.S.C §§ 3146–3152 (1982), *repealed in part by* Bail Reform Act of 1984, 18 U.S.C. §§ 3141–3150 (Supp. IV 1986). However, Congress later created the Bail Reform Act of 1984 as part of the Comprehensive Crime Control Act of 1984. *Id.* In addition to allowing pretrial detention as a device to ensure the detainee’s presence at trial, the Bail Reform Act of 1984 permits pretrial detention if after a hearing pursuant to a government motion, a judicial officer “finds that no condition of combination of conditions will reasonably assure . . . the safety of any other person and the community.” Bail Reform Act of 1984, 18 U.S.C. § 3142(e) (Supp. IV 1986).

⁹ *Klebanowski v. Sheahan*, 540 F.3d 633, 634 (7th Cir. 2008).

have forgotten that “the state does not acquire the power to punish . . . until after it has secured a formal adjudication of guilt.”¹⁰ Supreme Court law mandates that a pretrial detainee’s rights are “at least as great” as a convicted prisoner’s rights.¹¹ However, the Seventh Circuit’s recent decision, *Klebanowski v. Sheahan*, illustrates that the current analysis of a pretrial detainee’s § 1983 claim against a prison official for failure to safeguard inmates from other inmates replicates the analysis given to an identical claim by a convicted prisoner.¹²

Part I of this article discusses prisoners’ § 1983 claims against prison officials. First, it explains the evolution of “deliberate indifference” as the standard to evaluate convicted prisoners’ § 1983 claims against prison officials. Next, this article introduces *Bell v. Wolfish* where the Court declared that the rights of pretrial detainees are “at least as great” as convicted prisoners’ rights. Part II illustrates the circuit courts’ interpretation of how to analyze pretrial detainees’ § 1983 claims using the history of the analysis in the Seventh Circuit as an example. Finally, Part III discusses the problems of using the same standard on pretrial detainees and convicted prisoners. This article concludes that this trend amounts to the punishment of pretrial detainees before conviction in violation of the Due Process Clause.

I. § 1983 GIVES INMATES A CLAIM AGAINST PRISON OFFICIALS

Title 42 U.S.C. § 1983 provides a cause of action for any citizen deprived of any rights, privileges, or immunities secured by the Constitution and laws by a person acting under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia.¹³ Congress enacted § 1983 in 1871¹⁴ as a means

¹⁰ *Ingraham v. Wright*, 430 U.S. 651, 671, n.40 (1977).

¹¹ *See Bell v. Wolfish*, 441 U.S. 520, 545 (1979) (holding that “pretrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners.”).

¹² *Klebanowski*, 540 F.3d at 634.

¹³ 42 U.S.C. § 1983 (2000).

¹⁴ 15 AM. JUR. 2D *Civil Rights* § 62 (2008).

to enforce the provisions of the Fourteenth Amendment.¹⁵ Congress created the statute to provide citizens with a civil action against any misuse of power by a state actor given by the authority of the state.¹⁶ Supreme Court precedent requires prison officials to protect both convicted inmates and pre-trial detainees from violence inflicted by other inmates.¹⁷ Convicted inmates' § 1983 claims are analyzed under the Eighth Amendment's Cruel and Unusual Punishment Clause whereas pretrial inmates' § 1983 claims are analyzed under the Due Process Clause of the Fourteenth Amendment.¹⁸

A. The Evolution of “Deliberate Indifference” as the Standard to Evaluate Convicted Prisoners’ § 1983 Claims Against Prison Officials.

The treatment that convicted prisoners receive and the conditions of their confinement are subject to scrutiny under the Eighth Amendment.¹⁹ To make a § 1983 claim that a prison official violated an official duty, the injured inmate must prove two things: (1) “that the deprivation . . . [was], objectively sufficiently serious,”²⁰ and (2) that the prison official had a “sufficiently culpable state of mind.”²¹ The Supreme Court describes this state of mind as “‘deliberate indifference’ to inmate health and safety.”²²

The Supreme Court first employed the term “deliberate indifference” in 1976 while analyzing a claim about an inmate’s safety in *Estelle v. Gamble*.²³ In *Estelle*, a 600-pound bale of cotton fell on a prisoner, causing pain and stress in his back.²⁴ The petitioner filed a

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Farmer v. Brennan*, 511 U.S. 825, 833 (1994).

¹⁸ *Bell v. Wolfish*, 441 U.S. 520, 528 (1979).

¹⁹ *Helling v. McKinney*, 509 U.S. 25, 31 (1993).

²⁰ *Farmer*, 511 U.S. at 834 (citing *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)).

²¹ *Id.*

²² *Id.* (citing *Wilson v. Seiter*, 501 U.S. 294, 302–303 (1991)).

²³ *Estelle v. Gamble*, 429 U.S. 97, 105 (1976).

²⁴ *Id.* at 99.

pro se complaint against prison officials for a failure to provide him with adequate medical care.²⁵ The Court explained that “deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain,’ proscribed by the Eighth Amendment.”²⁶ Therefore, the Court held, deliberate indifference to a prisoner’s serious illness or injury states a cause of action under § 1983.²⁷

The Supreme Court further analyzed the objective component of a § 1983 claim in 1981 in *Rhodes v. Chapman*. In *Rhodes*, inmates brought a § 1983 claim against prison officials at the Southern Ohio Correctional Facility claiming that “double celling”²⁸ constituted cruel and unusual punishment.²⁹ The Court rejected petitioner’s claim based solely on the inadequacy of the objective component holding that “double celling” did not constitute cruel and unusual punishment.³⁰

Ten years after *Rhodes*, the Court decided *Wilson v. Seiter* where it emphasized that *Rhodes* did not eliminate the subjective component of an Eighth Amendment § 1983 claim.³¹ In *Wilson*, the Court explained that § 1983 claims always require a subjective inquiry into the prison officials’ state of mind no matter the gravity of objective conditions.³² The *Wilson* Court explained that the “wantonness” of conduct depends on actions of the official, not the harm inflicted on the inmate.³³ Additionally, the Court declared that *Estelle*’s “deliberate indifference” standard applies to all treatment received by prisoners, whether classified as “inhumane conditions of confinement, failure to

²⁵ *Id.* at 97.

²⁶ *Id.* (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)).

²⁷ *Id.* at 105.

²⁸ “Double celling” occurs when two inmates are lodged in the same cell.

²⁹ *Rhodes v. Chapman*, 452 U.S. 337, 344 (1981).

³⁰ *Id.*

³¹ *Wilson v. Seiter*, 501 U.S. 294, 298 (1991) (citing *Whitley v. Albers*, 475 U.S. 312, 319 (1986) (holding that it is “obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause.”)).

³² *Id.* at 299-302.

³³ *Id.* at 303.

attend to his medical needs, or a combination of both.”³⁴ The Court additionally explained in *Wilson* that “the protection [an inmate] is afforded against other inmates” is a condition of confinement.³⁵

Three years after the *Wilson* decision, in *Farmer v. Brennan*, the Supreme Court granted certiorari to determine an appropriate test to determine the meaning of “deliberate indifference.”³⁶ In *Farmer*, a transsexual inmate alleged that federal prison officials violated the Eighth Amendment by showing deliberate indifference to his safety after he had been beaten and raped by another inmate.³⁷ The inmate asserted that because of his appearance (he underwent estrogen therapy, received silicone breast implants, and “project[ed] feminine characteristics”) the respondents³⁸ should have known that he would be a target for sexual attacks from other inmates.³⁹ Before concluding that the prison officials did not show deliberate indifference to the inmate’s safety, the Court developed the test to determine when a prison official acts with “deliberate indifference.”

Farmer’s test involves two parts. First, the “deprivation must be, objectively, sufficiently serious.”⁴⁰ The Court explained that “a prison official’s act or omission must result in the ‘denial of the minimal civilized measure of life’s necessities.’”⁴¹ For a claim based on a prison official’s failure to prevent harm,⁴² “the inmate must show that

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Farmer v. Brennan*, 511 U.S. 825, 832 (1994).

³⁷ *Id.* at 829.

³⁸ The respondents were the warden of USP-Terre Haute and the Director of the Bureau of Prisons (sued only in their official capacities), the warden of FCI-Oxford and a case manager there, and the Director of the Bureau of Prisons North Central Region Office and an official in that office (sued in their official and personal capacities). *Id.* at 831.

³⁹ *Id.* at 830-831.

⁴⁰ *Id.* at 834 (quoting *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)).

⁴¹ *Id.* at 834 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)).

⁴² The Court in *Farmer* did not address at what point a risk of inmate assault becomes sufficiently substantial for an Eighth Amendment violation because the case did not present that issue.

he is incarcerated under conditions posing a substantial risk of serious harm.”⁴³ Second, the plaintiff must show that prison officials possessed “a sufficiently culpable state of mind.”⁴⁴ The Court explained that *Estelle* established that “deliberate indifference” indicated “a state of mind more blameworthy than negligence.”⁴⁵ The Court in *Farmer* expressed the opinion that “deliberate indifference” would fall between negligence and purpose or knowledge and acknowledged that the Courts of Appeal routinely equated “deliberate indifference” with recklessness.⁴⁶ The Court explained that “recklessness” could signify either civil recklessness or criminal recklessness.⁴⁷ Ultimately, the Court held that “deliberate indifference” likens with the more stringent standard, criminal recklessness, explaining that “the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.”⁴⁸ The Court felt that this standard aligned best with the text of the Eighth Amendment.⁴⁹ *Farmer* established that “deliberate indifference” is the test for convicted prisoners claiming a § 1983 claim brought pursuant to the Eighth Amendment against an official.⁵⁰

⁴³ *Farmer*, 511 U.S. at 834.

⁴⁴ *Id.* (quoting *Wilson v. Seiter*, 501 U.S. 294, 297 (1991)).

⁴⁵ *Id.* at 835 (citing *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)).

⁴⁶ *Id.* at 836.

⁴⁷ *Id.* The Court explained that civil law generally calls a person reckless who acts or, if the person has a duty to act, fails to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known. In contrast, the criminal law generally permits a finding of recklessness only when a person disregards a risk of harm of which he is aware.

⁴⁸ *Id.* at 839–840.

⁴⁹ *Id.* at 837.

⁵⁰ *Id.*

B. Wolfish Holds that a Pretrial Detainee’s Rights Are “At Least as Great” as a Convicted Prisoner’s Rights; No Standard Announced to Evaluate a Pretrial Detainee’s § 1983 Claims Against Prison Officials.

The Supreme Court examined the constitutional rights of pretrial detainees in the 1979 decision, *Bell v. Wolfish*, where the Court declared that the constitutional rights of a pretrial detainee flow from the procedural and substantive due process guarantees of the Fourteenth Amendment.⁵¹ *Wolfish* was a class action lawsuit brought to challenge numerous conditions of confinement and practices at the Metropolitan Correctional Center, a federally operated short-term custodial facility in New York City designed primarily to house pretrial detainees.⁵² In *Wolfish*, the Court analyzed the constitutionality of conditions of pretrial detention and focused on “whether those conditions amount[ed] to punishment of the detainee.”⁵³ The Court explained that “under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt.”⁵⁴ The Court clarified that, “a person lawfully committed to pretrial detention has not been adjudged guilty of any crime. He has had only a ‘judicial determination of probable cause as a prerequisite to [the] extended restraint of [his] liberty following arrest.’”⁵⁵ The Court explained that “if a restriction or condition [of pretrial detention] is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the government action is punishment that may not constitutionally be inflicted upon detainees.”⁵⁶

⁵¹ *Bell v. Wolfish*, 441 U.S. 520, 523 (1979).

⁵² *Id.* The facility also housed some convicted prisoners awaiting sentencing or transportation to another facility. *Id.* at 524.

⁵³ *Id.* at 535.

⁵⁴ *Id.*

⁵⁵ *Id.* at 536 (quoting *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975)).

⁵⁶ *Id.* at 539.

The Court explained that detainment obviously must interfere with the pretrial detainees' desire to live as comfortable as possible.⁵⁷ However, uncomfortable conditions do not amount to the punishment the Fourteenth Amendment prohibits.⁵⁸ The Court in *Wolfish* looked to *Kennedy v. Mendoza-Martinez* where the Court described tests traditionally applied to determine whether a governmental act is punitive in nature.⁵⁹ A court must look to see if a particular restriction that may appear to be punishment is instead a legitimate nonpunitive governmental objective.⁶⁰ The *Wolfish* Court explained that “[r]estraints that are reasonably related to the institution’s interest in maintaining jail security do not, without more, constitute unconstitutional punishment, even if they are discomforting and are restrictions that the detainee would not have experienced had he been released while awaiting trial.”⁶¹ The *Wolfish* Court next explained that the proper inquiry involves the constitutionality of the restrictions at issue and explained that “[t]here is no iron curtain drawn between the Constitution and the prisons of this country.”⁶²

Some protections that extend to *convicted* prisoners include the right to enjoy freedom of speech and religion under the First and Fourteenth Amendments;⁶³ protection against invidious discrimination

⁵⁷ *Id.* at 537.

⁵⁸ *Id.*

⁵⁹ *Id.* at 537-538. (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963)). In *Kennedy*, the Court explained the test as

[w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment-retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963).

⁶⁰ *Wolfish*, 441 U.S. at 538.

⁶¹ *Id.* at 540.

⁶² *Id.* at 545 (quoting *Wolff v. McDonnell*, 418 U.S. 539, 555-556 (1974)).

⁶³ *Id.* (citing *Pell v. Procunier*, 417 U.S. 817, 822 (1974)).

from the Equal Protection Clause;⁶⁴ and the right to claim the protection of the Due Process Clause to prevent additional deprivation of life, liberty, or property without due process of law.⁶⁵ The Court carefully clarified, however, that “simply because prison inmates retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations.”⁶⁶ The Court then established that “pretrial detainees, who have not been convicted of any crimes, retain *at least those constitutional rights* that . . . are enjoyed by convicted prisoners.”⁶⁷ The Court never conclusively established a test for pretrial detainees claiming a § 1983 action against prison officials for maltreatment. Thus, since *Wolfish*, courts have struggled to determine where pretrial detainees’ constitutional protection falls along the line of “at least as great” in such § 1983 claims.

II. THE CIRCUIT COURTS’ ANALYSIS OF PRETRIAL DETAINEES’ § 1983 CLAIMS.

Under *Bell v. Wolfish*, the Due Process rights of pretrial detainees are at least as great as the protections available to convicted prisoners under the Eighth Amendment.⁶⁸ This “at least as great” mandate from *Wolfish* has led to some confusion in determining how to analyze § 1983 claims.⁶⁹ The majority of circuit courts have settled on using

⁶⁴ *Id.* (citing *Lee v. Washington*, 390 U.S. 333 (1968)).

⁶⁵ *Id.* (citing *Meachum v. Fano*, 427 U.S. 215, 225 (1976)).

⁶⁶ *Id.*

⁶⁷ *Id.* (emphasis added).

⁶⁸ *Id.*

⁶⁹ In 1974, the Second Circuit explained that a pre-trial detainee is entitled to protection from cruel and unusual punishment as a matter of due process and, where relevant, equal protection. *Rhem v. Malcolm*, 507 F.2d 333, 337-38 (2d Cir. 1974). In 1978, the Second Circuit clarified that “pretrial detainees may be subjected to only those ‘restrictions and privations’ which ‘inhere in their confinement itself or which are justified by compelling necessities of jail administration.’” *Wolfish v. Levi*, 573 F.2d 118, 124 (2d Cir. 1978). Other circuits held that the Eighth Amendment prohibition against cruel and unusual punishment, incorporated in the

the same deliberate indifference standard for § 1983 causes of action outlined for convicted prisoners under the Eighth Amendment on pretrial detainees' due process claims.⁷⁰ In the process of reaching the deliberate indifference standard, courts provide less and less reasoning to support using the same standard on pretrial detainees that is used for convicted prisoners.

A. Before Wolfish: the Circuit Courts Struggle to Determine the Appropriate Standard to Analyze Pretrial Detainees' § 1983 Claims.

Before *Bell v. Wolfish* established that the protections afforded pretrial detainees are at least as great as those afforded convicted

Fourteenth Amendment applied to state treatment of pre-trial detainees. *See e.g.* *Johnson v. Lark*, F. Supp.289, 301-03 (E.D. Mo. 1973); *Collins v. Schoonfield*, 344 F. Supp. 257, 264-65 (D. Md. 1972). In 1977, the Fifth Circuit held that pretrial detention is only violative of the Due Process Clause when conditions placed on the detainee are more than what is necessary to assure the detainee's presence at trial. *Miller v. Carson*, 563 F.2d 741, 750 (5th Cir. 1977). The Seventh Circuit used a similar standard, holding that "as a matter of due process, pre-trial detainees may suffer no more restrictions than are reasonably necessary to ensure their presence at trial." *Duran v. Elrod*, 542 F.2d 998, 999 (7th Cir. 1978).

⁷⁰ *See, e.g.* *A.M. v. Luzerne County Juvenile Detention Center*, 372 F.3d 572, 584 (3d Cir. 2004) (acknowledging that pretrial detainees claims are properly analyzed under the Fourteenth Amendment yet indicating that due process obligations with respect to medical care had not been defined by the Supreme Court and holding that what is clear is that detainees are entitled to no less protection than a convicted prisoner is entitled to under the Eighth Amendment); *Hare v. City of Corinth, Miss.* 74 F.3d 633, 643 (5th Cir. 1996) (adopting a standard of deliberate indifference for all pretrial detainee § 1983 claims); *Estate of Moorland v. Dieter*, 395 F.3d 747, 758 (7th Cir. 2005) (holding that the pretrial detainee's unnecessary and excessive force due process claim falls within the Fourteenth Amendment, but applied the Eighth Amendment's deliberate indifference standard since the court had previously analyzed such claims under that standard); *Board v. Farnham*, 394 F.3d 469, 478 (7th Cir. 2005) (finding it "convenient and entirely appropriate to apply the same standard to claims arising under the Fourteenth Amendment (detainees) and the Eighth Amendment (convicted prisoners)); *Cook v. Sheriff of Monroe County*, 402 F.3d 1092, 1115 (11th Cir. 2005) (holding that in regard to providing pretrial detainees with basic necessities, the minimum standard allowed by the due process clause is the same as that allowed by the eighth amendment for convicted prisoners).

prisoners, courts had trouble determining how to analyze pretrial detainees' § 1983 claims. Some circuits opposed the suggestion that claims from pretrial detainees should be analyzed the same as those from convicted felons.⁷¹ Some circuits applied the same "deliberately indifferent" standard outlined in *Farmer*.⁷² Some circuits avoided the question altogether while deciding their case.⁷³ The Fourth Circuit attempted to create a specific analysis for pretrial detainees suggesting that "[t]he fourteenth amendment . . . must be read to recognize a distinct status of a pretrial detainee: a citizen not yet convicted, yet at the same time not possessing the full range of freedoms of an unincarcerated citizen."⁷⁴

B. Evolution of § 1983 Claims in the Seventh Circuit

The circuits generally apply the Eighth Amendment's deliberate indifference standard to pretrial detainees. To understand an example of how the courts arrived on the standard, an illustration of the history of the Seventh Circuit's analysis of pretrial detainees' § 1983 claims follows.

⁷¹ See *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973) (announcing that the court had "considerable doubt that the cruel and unusual punishment clause is properly applicable at all until after conviction and sentencing" and that "it would be absurd to hold that a pretrial detainee has less constitutional protection against acts of prison guards" than a convicted prisoner); *Norris v. Frame*, 585 F.2d 1183, 1187 (4th Cir. 1978) (holding that the protection afforded convicted felons under the Eighth Amendment is useful by analogy, but the two levels of protection should not be thought of as co-extensive).

⁷² See *Arroyo v. Schaefer*, 548 F.2d 47, 50 (1977) (holding that "while the Eighth Amendment may not, strictly speaking, be applicable to pretrial detainees . . . due process requires no more in this context," and applying the deliberate indifference standard).

⁷³ *Hampton v. Holmesburg Prison Officials*, 546 F.2d 1077, 1079 (3d Cir. 1976) (reasoning that the facts of the case "mandate a finding that there has been no constitutional deprivation, whatever the derivation [of the right]").

⁷⁴ *Id.* at 1187.

The Seventh Circuit once recognized that the due process clause did not require a showing of deliberate indifference.⁷⁵ In 1982, in *Kincaid v. Risk*, the Seventh Circuit rejected the appellee's assertion that *Wolfish* considered with *Estelle* indicated that pretrial detainees' claims should be analyzed pursuant to the Eighth Amendment "deliberate indifference" standard.⁷⁶ The court elaborated, "*Estelle*, which involved an eighth amendment claim by a convicted prisoner, is not directly relevant to the due process standard applicable to pretrial detainees as enunciated in *Wolfish*."⁷⁷

In 1988, the Seventh Circuit analyzed a pretrial detainee's claim that prison guards allowed an impending attack from another inmate.⁷⁸ In *Anderson v. Gutschenritter*, the Seventh Circuit explained that "[b]ecause there had been no formal adjudication of guilt against [the detainee] . . . the Eighth Amendment has no application. The due process rights of a person in [the detainee's] situation are at least as great as the Eighth Amendment protections available to a convicted prisoner, and it is in this light that [the detainee's] claim must be evaluated."⁷⁹ However, the Seventh Circuit did not explicitly state nor apply the Eighth Amendment's "deliberate indifference" standard. Rather, the court found that a jury could have found in the detainee's favor because "[t]he jury could have found that [the defendant] had shown indifference or a willingness to allow the attack."⁸⁰ The court overruled the district court, explaining that the jury could have inferred that the defendants "failed to protect [the detainee] after learning of a strong likelihood that [the detainee] would be assaulted."⁸¹

⁷⁵ *Matzker v. Herr*, 748 F.2d 1142, 1146 (7th Cir. 1984); *Kincaid v. Rusk*, 670 F.2d 737, 743 n.8 (1982).

⁷⁶ *Kincaid v. Rusk*, 670 F.2d 737, 743 n.8 (1982).

⁷⁷ *Id.*

⁷⁸ *Anderson v. Gutschenritter*, 836 F.2d 346, 349 (7th Cir. 1988).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

1. “Deliberate indifference” is the appropriate standard for pretrial detainees’ § 1983 claims against prison officials

The Seventh Circuit settled on the “deliberate indifference” standard for pretrial detainees’ § 1983 claims against prison officials for failure to provide adequate medical care in 1991 in *Salazar v. City of Chicago*. In that case, the Seventh Circuit had to determine the standard that governs pretrial detainees’ claims for state officials’ failure to provide medical care.⁸² The *Salazar* court settled on the Eighth Amendment’s deliberate indifference standard using a similar reasoning process to the Supreme Court’s analysis in *Farmer*.⁸³ The *Salazar* court rejected the plaintiff’s suggested standards of either negligence or gross negligence citing the Supreme Court’s decision in *Davidson v. Cannon* that declared that grossly negligent conduct did not implicate the due process clause.⁸⁴ Accordingly, the *Salazar* court concluded that if gross negligence does not implicate the due process clause, neither will negligence since it is a lower standard than gross negligence.⁸⁵ The *Salazar* court looked to its previous holding in *Duckworth* where it held that “deliberate indifference” means intentional or criminally reckless conduct.⁸⁶ The *Salazar* court explained that “only intentional or criminally reckless conduct implicates the due process clause,⁸⁷ and since ‘deliberate indifference’

⁸² *Salazar v. City of Chicago*, 940 F.2d 233, 238 (7th Cir. 1991).

⁸³ *Farmer* was decided in 1994. *Farmer v. Brennan*, 511 U.S. 825 (1994). Thus, the reasoning was not borrowed.

⁸⁴ *Salazar*, 940 F.2d at 238 (citing *Davidson v. Cannon*, 474 U.S. 344, 347-48 (1986)).

⁸⁵ *Id.*

⁸⁶ *Duckworth v. Franzen*, 780 F.2d 645, 648 (7th Cir. 1985). In *Duckworth*, twenty one prisoners brought a § 1983 claim against prison officials for injuries sustained from a bus fire. *Id.* Thirty five prisoners were handcuffed with all the prisoners on each side of the aisle joined together by a chain running through the handcuffs. *Id.* When the bus filled with dense smoke, the prisoners tried to exit without success. *Id.* One prisoner died from the ordeal and others suffered serious to permanent lung injury. *Id.*

⁸⁷ *Id.* (citing *Archie v. City of Racine*, 847 F.2d 1211, 1218-19 (7th Cir. 1988)).

(in this circuit) is merely a synonym for intentional or criminally reckless conduct,” it follows that deliberate indifference is the proper standard of conduct in the case of a pretrial detainee.⁸⁸

Additionally, the *Salazar* court explained that, according to *Wolfish*, the proper inquiry when determining whether a state actor violated a pretrial detainee’s due process rights is whether the act at issue amounted to punishment of the detainee.⁸⁹ The *Salazar* court then cited to its prior holding in *Duckworth* to explain that “punishment, in its normal meaning, implies intent; it is ‘a deliberate act intended to chastise or deter.’”⁹⁰ The *Salazar* court explained its reasoning; “[f]or a jail guard deliberately to beat a pretrial detainee would be ‘punishment’; for the guard negligently to step on the detainee’s toe and break it would not be punishment ‘in anything remotely like the accepted meaning of the word.’”⁹¹ From there, the court reasoned that an act done with any state of mind less than intent is not punishment,⁹² and therefore “criminal recklessness is a proxy for intent.”⁹³ Accordingly, “[s]ince the due process clause prohibits punishing a pretrial detainee . . . and since only intentional or criminally reckless conduct can amount to punishment, only . . . deliberate indifference to the detainee’s serious medical need—violates due process.”⁹⁴

The *Salazar* court then carefully explained that adopting the deliberate indifference standard to govern § 1983 claims of pretrial detainees would not imply that the Eighth Amendment governs the claims.⁹⁵ The court reasoned that even though the Eighth Amendment prohibits cruel and unusual punishment and the Fourteenth Amendment does not allow jailers to punish pretrial detainees at all,

⁸⁸ *Id.*

⁸⁹ *Salazar*, 940 F.2d at 239.

⁹⁰ *Duckworth*, 780 F.2d at 652.

⁹¹ *Salazar*, 940 F.2d at 239.

⁹² *Id.*

⁹³ *Id.* (citing *Archie v. City of Racine*, 847 F.2d 1211, 1220 (7th Cir. 1988)).

⁹⁴ *Salazar*, 940 F.2d at 239.

⁹⁵ *Id.*

both amendments prohibit punishment to a certain extent. To determine if an act violates a pretrial detainee's rights, the proper question is, 'does the act amount to punishment of the detainee?' The *Salazar* court looks to its reasoning in *Duckworth* where it held that to be punishment an act must be intentional or criminally reckless.⁹⁶ The court then reasoned that "punishment is punishment, and there is no reason why the term should mean two different things in the Eighth and Fourteenth Amendment contexts and concluded that *Duckworth's* definition of punishment is just as relevant in the Fourteenth Amendment context as it is in the Eighth Amendment context.⁹⁷

In 1996, the Seventh Circuit applied the deliberate indifference standard to pretrial detainees in *Estate of Cole v. Fromm*. In that case, the Seventh Circuit analyzed a § 1983 claim against prison officials in which officials allegedly knew that the plaintiff was a suicide risk and failed to provide him with adequate protection.⁹⁸ In *Cole*, the Seventh Circuit acknowledged that the due process rights of a pretrial detainee were at least as great as the Eighth Amendment protection available to a convicted prisoner.⁹⁹ The court noted that the Supreme Court had not resolved the issue of whether the deliberate indifference standard should apply to pretrial detainees and applied the Eighth Amendment deliberate indifference standard.¹⁰⁰

In 1999, the Seventh Circuit explained in *Higgins v. Correctional Medical Services of Illinois, Inc.*, that to properly state a claim for an Eighth Amendment violation, the plaintiff must show that the defendants were deliberately indifferent.¹⁰¹ Next, the Seventh Circuit explained that the rights of a pre-trial detainee are at least as great as the protection available to a convicted prisoner, and analyzed the

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Estate of Cole v. Fromm*, 94 F.3d 254, 259 (7th Cir. 1996).

⁹⁹ *Id.* at 259 n.1.

¹⁰⁰ *Id.*

¹⁰¹ *Higgins v. Correctional Med. Services of Illinois, Inc.*, 178 F.3d 508, 511 (7th Cir. 1999).

complainant's claim under the Eighth Amendment's deliberate indifference standard.¹⁰²

Currently, the Seventh Circuit, like most other circuits, considers the standard applied to convicted prisoners under the Eighth Amendment and pre-trial detainees under the Due Process Clause of the Fourteenth Amendment "to be analogous."¹⁰³ In 2002, in *Washington v. LaPorte County Sheriff's Department*, the Seventh Circuit analyzed a pretrial detainee's § 1983 claim under the deliberate indifference standard.¹⁰⁴ The Seventh Circuit established in a mere two sentences that pretrial detainees' claims can be analyzed under the same "deliberate indifference" standard used to analyze the claims of convicted prisoners.¹⁰⁵ The *Washington* court explained that it analyzes the claims under the deliberate indifference standard because the pretrial detainees' arguments are based on Eighth Amendment precedent.¹⁰⁶

2. The Seventh Circuit's Application of the Deliberate Indifference Standard in *Klebanowski v. Sheahan*.

In 2008, in *Klebanowski v. Sheahan*, the Seventh Circuit analyzed a § 1983 claim alleging that officials showed deliberate indifference to the due process rights of Klebanowski, a pretrial detainee.¹⁰⁷ Klebanowski explained that three gang member inmates, Little E, Count and Yo-Yo, approached him and demanded that he pay them twenty dollars each month in return for their protection.¹⁰⁸ After he refused, they beat him and told him that they would beat him again if he refused to pay him and that they would kill him if he told the

¹⁰² *Id.*

¹⁰³ *Washington v. LaPorte County Sheriff's Dep't*, 306 F.3d 515, 517 (7th Cir. 2002).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* (citing *Estate of Cole*, 94 F.3d at 259 n.1).

¹⁰⁷ *Klebanowski v. Sheahan*, 540 F.3d 633, 634 (7th Cir. 2008).

¹⁰⁸ *Id.* at 635.

guards anything about the incident.¹⁰⁹ Klebanowski's injuries were serious enough for a guard to inquire about his condition.¹¹⁰ Fearing for his safety, Klebanowski stated that he had slipped.¹¹¹ The guard doubted his explanation but recorded his statement as given without asking further questions.¹¹² Later, Klebanowski requested he be moved to a different section of the jail because "he feared for his life."¹¹³ The officers stated that they knew what happened to him but that moving him would not help because "the conditions were the same wherever he could be moved."¹¹⁴ Later, Klebanowski approached a different set of officers and asked to be moved because he feared for his life.¹¹⁵ Again, the officers denied his request.¹¹⁶

The next day, a correctional officer working Klebanowski's unit announced that he was going to open the cells and allow the inmates free time before lockdown.¹¹⁷ The officer also announced that he would leave the deck and return in a few minutes.¹¹⁸ Klebanowski exited his cell and while he was watching television, Little E, Count and Yo-Yo approached him from behind and beat him.¹¹⁹ This time, Count pulled a shank¹²⁰ that he had concealed in his pants and stabbed

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ A shank is a homemade knife. *Id.*; Interview with Cook County Dep't of Corrections Inmate, in Chicago, IL (Nov. 25, 2008). An inmate, a pretrial detainee, explained that thin wavy metal pieces woven together once created the grates of the vents at the Cook County Jail, Division 9. *Id.* Inmates pulled off these pieces of the vents, straightened them out and sharpen the ends across the floor or walls of their cells. *Id.* The pieces are cut so that they are small and concealable and bundled

Klebanowski on the left side of his stomach.¹²¹ Klebanowski was stabbed two more times while being beaten.¹²² He escaped the beating and jumped over a railing from the top deck to the lower deck.¹²³ As he jumped over the deck, Count stabbed him again in the back of the head.¹²⁴ Once Klebanowski reached the bottom deck, he ran to an exit and pressed a panic button.¹²⁵ There was no response for five minutes.¹²⁶ The correctional officers finally appeared after Klebanowski waved through a window.¹²⁷ “Klebanowski spent two days in the hospital and had to have his spleen removed as a result of the injuries he sustained during the attack.”¹²⁸ After learning of this attack, the officers searched all of the cells on the tier and uncovered fourteen shanks.¹²⁹

Klebanowski filed suit under § 1983 in the district court on September 8, 2004.¹³⁰ Klebanowski claimed that the defendants

together to create a dangerously powerful weapon. *Id.* These type of vents have since been replaced. *Id.*

¹²¹ *Klebanowski*, 540 F.3d at 635.

¹²² *Id.*

¹²³ *Id.* Klebanowski was housed in division 11, a 640,000 square-foot, medium security facility consisting of a central core surrounded by four housing PODS (units). Cook County Department of Corrections, Division 11, http://www.cookcountysheriff.org/doc/html/div_11.html (last visited Dec. 9, 2008).

¹²⁴ *Klebanowski*, 540 F.3d at 635

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* Klebanowski sued Cook County Sheriff Michael Sheahan, Department of Corrections Director Callie Baird, and Superintendent of Division 11, Henry Troka in their official capacities. *Id.* He sued William Scott, Jermaine Smith and Rafael Trevizo individually. *Id.* Initially, Klebanowski also listed Baird’s predecessor, Ernesto Velasco. Klebanowski voluntarily dismissed Velasco on February 9, 2005. *Id.* Initially, Klebanowski listed the three correctional officers as “Unknown Corrections Officers 1, 2 & 3.” *Id.* On May 9, 2005, Klebanowski filed an amended complaint adding as a defendant Clifford Smith. *Id.* In a second

violated his Fourteenth Amendment rights by implementing three *de facto* policies: (1) allowing his wing to be controlled by gang members and not separating gang members from non-gang members; (2) allowing gang member inmates to keep weapons in their cells; and (3) leaving inmate wings entirely unsupervised regularly for significant periods of time.¹³¹

The Seventh Circuit explained that because Klebanowski was a pre-trial inmate, his § 1983 claims would be analyzed under the Due Process Clause of the Fourteenth Amendment rather than the Eighth Amendment's Cruel and Unusual Punishment Clause. Klebanowski had to establish that the deliberate indifference to which he was subjected was a result of custom or policy established by the officials.¹³² To establish deliberate indifference on the part of the defendants sued individually, Klebanowski needed to show that the officers acted with the equivalent of criminal recklessness.¹³³ The court ultimately held that Klebanowski did not show deliberate indifference on the part of the officers.¹³⁴ Under the Eighth Amendment's deliberate indifferent standard, the court's analysis was correct. However, the standard used should not have been the same because Klebanowski had not been convicted of a crime; he was awaiting trial.

III. IMPLICATIONS OF TREATING PRETRIAL DETAINEES AS CONVICTED PRISONERS

The Supreme Court has not declared the appropriate standard for evaluating pretrial detainees' § 1983 claims.¹³⁵ While not resolving the

amended complaint, filed on July 14, 2005, Klebanowski named William Scott, Jermaine Smith, and Rafael Trevizo to replace the three unknown officers. *Id.*

¹³¹ *Id.*

¹³² *Id.* at 637.

¹³³ *Id.*

¹³⁴ *Id.* at 640.

¹³⁵ *See* Estate of Cole v. Fromm, 94 F.3d 254, 259 (7th Cir. 1996).

appropriate approach, the Supreme Court and the circuit courts consistently apply the deliberate indifference standard.¹³⁶

A. Problems with the Circuit Courts' Current Analysis

The most frustrating aspect of the courts' application of the same standard between convicted prisoners and pretrial detainees is the circuit courts' lack of explanation for employing the same standard.¹³⁷ Some courts that do provide an explanation for using the Eighth Amendment's deliberate indifferent standard employ it for convenience—the circuit has used that standard previously.¹³⁸ Others

¹³⁶ See e.g. *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989); *Pietrafeso v. Lawrence County*, 452 F.3d 978, 982 (8th Cir. 2006) (analyzing a claim alleging failure of Lawrence County to provide adequate medical care and holding that the Eighth Amendment deliberate-indifference applies to pretrial detainees as well as convicted prisoners.); *Andujar v. Rodriguez*, 486 F.3d 1199, 1203-04 (11th Cir. 2007) (analyzing a claim where an inmate was bitten by a dog and finding that the standard that governs deliberate indifference claims to pretrial detainees' serious medical needs is the same as the standard covering convicted prisoners' claims); *Gray v. City of Detroit*, 399 F.3d 612, 616 (6th Cir. 2005) (holding that a pretrial detainee's right to medical care is the same as the right afforded convicted prisoners under the Eighth Amendment).

¹³⁷ See *Burrell v. Hampshire County*, 307 F.3d 1, 7 (1st Cir. 2002) (holding that pretrial detainees are protected under the Fourteenth Amendment rather than the Eighth Amendment but offering no analysis as to why the court uses the Eighth Amendment deliberate indifference standard for a pretrial detainee's § 1983 claim); *Cottrell v. Caldwell*, 85 F.3d 1480, 1490 (11th Cir. 1996) (explaining in a mere two sentences that (1) the Due Process Clause of the Fourteenth amendment governs claims involving the mistreatment of pretrial detainees instead of the Eighth Amendment, and (2) the applicable standard is the same, so "decisional law involving prison inmates applies equally to cases involving arrestees or pretrial detainees."); *Crow v. Montgomery*, 403 F.3d 598, 601 (8th Cir. 2005) (explaining that as a pretrial detainee, the plaintiffs claims are analyzed under the Due Process Clause and applying the Eighth Amendment's deliberate indifference standard because under the Fourteenth Amendment pretrial detainees are entitled to at least as great protection as that afforded convicted prisoners under the Eighth Amendment.).

¹³⁸ See *Owens v. Scott County Jail*, 328 F.3d 1026, 1027 (8th Cir. 2003) (holding that "although this court has not yet established a clear standard for determining when pretrial detention is unconstitutionally punitive, we have applied

identify the difference between pretrial detainees and convicted prisoners but fail to use any standard besides the Eighth Amendment's deliberate indifference standard for pretrial detainees.¹³⁹ Other courts have asserted that the standard for providing basic human needs is the same for pretrial detainees and convicted prisoners and reason that the Eighth Amendment standard should apply.¹⁴⁰ The Eighth Circuit has even analyzed a pretrial detainee's claim first under the Fourteenth Amendment and then under the Eighth Amendment.¹⁴¹

Other courts exhibit somewhat of a reversal in reasoning. These courts' holdings suggest that a pretrial detainee should be able to receive the same level of care that a convicted prisoner is already constitutionally required to receive or that a pretrial detainee can bring

the Eighth Amendment 'deliberate indifference' standard."); *Whitnack v. Douglass County*, 16 F.3d 954, 957 (8th Cir. 1994) (applying a standard "identical to the legal standard" applied to convicted prisoners because the standard for "pretrial detainees 'is not clearly established,'" and deliberate indifference is appropriate in the absence of a clearly established standard); *Vaughn v. Green County, Ark.*, 438 F.3d 845, 850 (8th Cir. 2006) (recognizing that pretrial detainees deserve protection that is at least as great as the protection given to convicted inmates and applying the Eighth Amendment deliberate indifference standard to pretrial detainees because it has repeatedly applied that standard.); *Board v. Farnham*, 394 F.3d 469, 478 (7th Cir. 2005) (finding it "convenient and entirely appropriate to apply the same standard to claims [from detainees] arising under the Fourteenth Amendment . . . and [claims from convicted prisoners arising under the] Eighth Amendment.").

¹³⁹ See *Estate of Morgan v. Toombs County*, 400 F.3d 1313, 1318 n.13, 1319 (11th Cir. 2005) (asserting that whether or not the plaintiff is treated as a pretrial or convicted prisoner, the standard for providing basic human needs to those incarcerated is the same and proceeding to apply the Eighth Amendment's deliberate indifference standard); *Vaughn v. Green County, Ark.*, 438 F.3d 845, 850 (8th Cir. 2006).

¹⁴⁰ See *Estate of Morgan*, 400 F.3d at 1318 n.13, 1319l; *Gibbs v. Gimmette*, 254 F.3d 545, 548 (5th Cir. 2001) (finding that "there is no significant distinction between pretrial detainees and convicted inmates concerning the basic human needs such as medical care," and thus the Eighth Amendment's deliberate indifference standard applies).

¹⁴¹ *Smith v. Copeland*, 87 F.3d 265, 268 n.4 (8th Cir. 1996) (finding that under *Bell's* Fourteenth Amendment standard, the detainee's claims "do not rise to a level of constitutional significance" and then holding that the detainee's claim fails under the Eighth Amendment's deliberate indifference standard).

the same claim that a convicted prisoner is already constitutionally entitled to bring.¹⁴² For example, in *Barrie v. Grand County*, the Tenth Circuit held that pretrial detainees are owed the same duty of medical care as that afforded convicted prisoners and applied the deliberate indifference standard. Likewise, in *Danley v. Allen*, the Eleventh Circuit explained that “[p]retrial detainees, who are not protected by the Eighth Amendment, can bring the same claims under the Fourteenth Amendment.” This analysis indicates that a convicted prisoner is constitutionally guaranteed a specific level of care or is constitutionally guaranteed the right to bring a specific claim, and a pretrial detainee can acquire care *up to* that level or can acquire the right to bring *that* specific claim. In contrast, the Supreme Court declared in *Wolfish* that the rights of a pretrial detainee are “at least as great” as a convicted prisoner’s rights.¹⁴³ Thus, a convicted prisoner is constitutionally guaranteed a specific level of care or is constitutionally guaranteed the right to bring a specific claim, and a pretrial detainee deserves a level of care *no less than* that level or will not have to bring a claim *any less* compensatory as that claim.

Another example in reversal in reasoning is the court’s determination of what to do when a claim involves both pretrial detainees and convicted prisoners. In 1978, the D.C. Circuit explained in *Owens-El v. Robinson* that “[w]here pretrial detainees and convicted prisoners are commingled in their cell assignments, the constitutional common denominator must be the rights of the pretrial detainees.”¹⁴⁴ In contrast, in 2005, in *Estate of Morgan*, the Eleventh Circuit explained that whether or not the plaintiff is treated as a pretrial detainee or convicted prisoner, the standard for providing basic human

¹⁴² See *Barrie v. Grand County*, Utah, 119 F.3d 862, 868-869 (10th Cir. 1997) (holding that pretrial detainees are owed the same duty of medical care as that afforded convicted prisoners and applying the deliberate indifference standard); *Danley v. Allen*, 540 F.3d 1298, 1306 (11th Cir. 2008) (explaining that “[p]retrial detainees, who are not protected by the Eighth Amendment, can bring the same claims under the Fourteenth Amendment.”).

¹⁴³ *Bell v. Wolfish*, 441 U.S. 520, 528 (1979).

¹⁴⁴ *Owens-El v. Robinson*, 442 F. Supp. 1368, 1374 (D.C. Cir. 1978).

needs to those incarcerated is the same and proceeded to apply the Eighth Amendment's deliberate indifference standard.¹⁴⁵

This type of analysis indicates that courts have forgotten that pretrial detainees have greater rights than convicted prisoners. While the convicted prisoner has the right to be free from cruel and unusual punishment; the pretrial detainee has the right to be free from punishment altogether.¹⁴⁶ Therefore, the pretrial detainee should be owed a higher standard of care than the convicted prisoner.

B. The Need for a Better Analysis

In this crucial time before the Supreme Court settles on a specific standard to apply, that pretrial detainees are differently situated than convicted prisoners cannot be forgotten. Justice Marshall points out in his dissent of *Wolfish* that “conspicuously lacking from [the majority’s] analysis is any meaningful consideration . . . that all of these detainees are presumptively innocent and many are confined solely because they cannot afford bail.”¹⁴⁷ Marshall expresses disapproval of the Court’s lack of attention to the impact of pretrial detention on the individual detainee.¹⁴⁸ That an individual cannot afford a bail bond, “is an insufficient reason for subjecting him to indignities that would be appropriate punishment for convicted felons.”¹⁴⁹

The *Wolfish* majority took a narrow view of the presumption of innocence and asserted that it has no bearing on the rights of a pretrial detainee outside of the courtroom.¹⁵⁰ Yet, it cannot be denied that a

¹⁴⁵ Estate of Morgan v. Toombs County, 400 F.3d 1313, 1318 n.13 (11th Cir. 2005).

¹⁴⁶ U.S. CONST. amend. VIII; Ingraham v. Wright, 430 U.S. 651, 671 n.40 (1977).

¹⁴⁷ Bell v. Wolfish, 441 U.S. 520, 563 (1979) (Marshall, J., dissenting).

¹⁴⁸ See *id.* at 563–587.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 533 (1979) (holding that the presumption of innocence “has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.”).

pretrial detainee is innocent until proven guilty beyond a reasonable doubt.¹⁵¹ It has been asserted that the legal status of a pretrial detainee should influence her conditions in jail.¹⁵² Additionally that, “[i]ncarceration of detainees and prisoners under the same conditions treats detainees as criminals.”¹⁵³ Likewise, analyzing claims of detainees and prisoners under the same standard treats detainees as criminals or convicted prisoners. Convicted prisoners are incarcerated for punishment. Treating those convicted prisoners’ claims the same as pretrial detainees’ claims amounts to punishment of the detainee in violation of the due process clause.¹⁵⁴

CONCLUSION

The United States currently houses the largest inmate population in the world with over two and a half million adults in prison and jail with over one in every one hundred adults in prisons and jails.¹⁵⁵ On June 29, 2007, there were 780,581 inmates in local jails.¹⁵⁶ Sixty-two

¹⁵¹ *Coffin v. United States*, 156 U.S. 432, 453 (1895) (holding that “every man is presumed to be innocent until his guilt is proved beyond a reasonable doubt”).

¹⁵² Rimat Kitai-Sangero, *Conditions of Confinement—The Duty to Grant the Greatest Possible Liberty for Pretrial Detainees*, 43 No. 2 CRIM. L. BULL. 4.

¹⁵³ *Id.*

¹⁵⁴ *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977) (holding that due process requires that a pretrial detainee not be punished at all).

¹⁵⁵ U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS (Mid-year 2005), <http://www.ojp.usdoj.gov/bjs/abstract/pjim05.htm>; JENNIFER WARREN, THE PEW CENTER ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf. Over two and a half million adults are in prison and jail. *Id.* The number of American adults is about 230 million. *Id.* One in thirty-six Hispanic adults is behind bars, one in fifteen black adults and one in nine black men between the ages of twenty and thirty-four is behind bars. *Id.*; see also Adam Liptak, *1 in 100 U.S. Adults Behind Bars, New Study Says*, N.Y. TIMES, Feb. 28, 2008, available at <http://www.nytimes.com/2008/02/28/us/28cnd-prison.html>.

¹⁵⁶ DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, SLOWER GROWTH IN THE NATION’S PRISON AND JAIL POPULATIONS (2008), <http://www.ojp.usdoj.gov/bjs/pub/press/pim07jim07pr.htm>; Jails are locally operated facilities that confine people who are pending trial or await movement to another

percent of those inmates had not been convicted on their current charge.¹⁵⁷ Thus, almost half a million people are incarcerated without a conviction.¹⁵⁸ Under the current state of the law, any § 1983 claim against prison officials from these pretrial detainees, will be analyzed under the Eighth Amendment deliberate indifference standard created for convicted prisoners. Accordingly, the law currently treats § 1983 claims from almost half a million innocent people as if they were convicted prisoners.

facility. U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, JAIL STATISTICS (Mid-year 2008), <http://www.ojp.usdoj.gov/bjs/jails.htm>.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* (Sixty-two percent of 780,581 is 483,960.22)